

ADVISORY ETHICS OPINION 87-13

SYNOPSIS:

An attorney may take a mortgage on a client's home to secure payment of unearned but anticipated legal fees and expenses but may not take and record a mortgage unrelated to fees for the sole purpose of frustrating efforts of judgment creditors to collect the client's debts.

QUESTIONS PRESENTED:

Our Committee has been asked whether the Code permits an attorney to take a mortgage on a client's home to secure payment for unearned legal fees and expenses. The Committee has interpreted this request to mean unearned but anticipated legal fees and expenses. The attorney has also asked whether the Code permits an attorney to take and record a mortgage on a client's property for the purpose of frustrating the efforts of judgment creditors to collect the client's debts.

OPINION:

The Code of Professional Responsibility permits an attorney to acquire a lien on client property to secure payment of the attorney's fee or expenses.

DR 5-103(A)(1) states as follows:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

- (1) Acquire a lien granted by law to secure his fee or expenses.

It is not clear whether the phrase "granted by law" was intended to limit the types of liens an attorney can assert against a client to those which arise by operation of law such as the attorney's lien recognized at common law and discussed in prior opinions of this Committee,¹ or whether a lien complying with legal requisites and thus having lien status under law is permissible. We have found no opinion directly addressing this point, however, ABA Informal Decision 593 strongly suggests that taking a lien on client property to secure past or future fees is permissible. The decision states in pertinent part:

There is nothing inappropriate in a lawyer setting in advance the performance of the work a lump sum as his fee nor in requiring payment of the fee in advance. It is not per se improper for an attorney to take security for the payment of the fee earned or to be earned.

Informal Decision 593 does not directly decide whether an attorney may take a mortgage on his client's premises, but the above cited language would appear to permit such an action.

EC 5-7 is also instructive on this point and provides in pertinent part as follows:

. . . it is not improper for a lawyer to protect his right to collect his fee for his services by the assertion of legally permissible liens even though by doing so he may acquire an interest in the outcome of litigation.

We conclude, therefore, that the taking and recording of the mortgage on a client's property to secure past or future fees is not prohibited under the Code. The attorney's first question is therefore answered in the affirmative.

The second question is answered in the negative. The Code does not permit an attorney to take and record a mortgage for the purpose of frustrating attempts of judgment creditors to collect clients' debts.

DR 7-101(B)(2) states:

In his representation of a client, a lawyer may:

- (2) refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-102(A)(7) states:

In his representation of a client, a lawyer shall not:

- (7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

The taking and recording of a mortgage, not related to fees and expenses, for the purpose of diminishing a client's equity in his premises so as to frustrate the attempts of judgment creditors to collect the client's debts would constitute an attempt to defraud

¹ See Opinion 85-4.

creditors and runs afoul of the above disciplinary rule. It bears noting, however, that where a mortgage is taken to secure payment of earned or anticipated legal fees and expenses, the acquisition of the lien is permissible under the Code even though it may well have the effect of diminishing the client's equity in the client's property and thereby hinder the efforts of judgment creditors to collect their claims against the client.